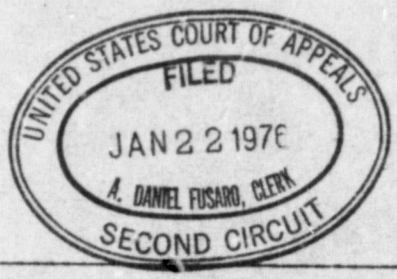
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF



75-7514

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

FRANK A. QUINLAN,
Plaintiff-Appellee

vs

HILTI, INC.,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF THE CASE

By complaint dated July 19, 1973, the plaintiff, Frank A. Quinlan, brought a civil action against defendant Hilti, Inc. alleging that he was injured as a result of negligence in breaches of strict liability and warranty on the part of the defendant in selling a certain power actuated fastener to the employee of the plaintiff. Jurisdiction in the United States District Court for the District of Vermont, Civil Action File No. 73-197, was based upon the grounds of diversity of citizenship with alleged damages in excess of $10,000.00.

The case was tried in Brattleboro, Vermont on July 7-14, 1975 resulting in the case being submitted to the jury on the theories of negligence (Restatement of Torts §388)and strict liability in tort (Restatement of Torts §402A). The jury was given the case on special interrogatories to be answered on the questions of strict liability, negligence, contributory negligence, assumption of the risk and damages. (Transcript: 688-689) The jury returned a verdict in favor of the plaintiff in the amount of $50,000.00 on the basis of negligence. The jury declined to find in favor of the plaintiff on the grounds of strict liability in tort. The defendant has appealed the verdict in favor of the plaintiff. No appeal is taken on the question of damages.

ISSUES

1. Whether the verdict in favor of the plaintiff on the theory of negligence was inconsistent with the verdict in favor of the defendant on the theory of strict liability?

2. Whether the Court during the trial committed error in the admission of certain testimony of the plaintiff's expert witness?

3. Whether the evidence on the question of the defendant's negligence was sufficient to support a verdict in favor of the plaintiff on this theory?

STATEMENT OF FACTS

On July 20, 1970, the plaintiff, Frank A. Quinlan, sustained an injury to his knee on a construction project located on the campus of the University of Vermont. Two sections of a steel three-inch conduit pipe with a total length of 20 feet, and weighing a total of approximately 150 lbs., fell from on overhead ceiling, knocking the plaintiff off of an ten-foot stepladder and causing him to fall to the ground. (A: 67) On the day in question, the plaintiff and a co-worker were attempting to insert the conduit pipe into a trapeze-like hanger fastened to a steel beam overhead. The sides of the trapeze-like hanger were constructed of eight-inch length of three-eighths threaded rod. (A: 36) The bottom of the hanger, on which the conduit was to rest, was constructed of a piece of metal bar called unistrut, placed over the three-eighths threaded rod and held in place by ordinary nuts and washers. The top of the trapeze-like hanger was fastened to the steel beam overhead by means of two fasteners and adapters that are in issue in this litigation. (See generally testimony of Clement Vallieres)

The fastener is nothing more than a very hard pointed steel pin that is driven about three-eighths into the overhead steel beam by means of a power actuated tool also manufactured by the defendant. (A: 32-34)

Once the pin is driven into the steel beam, a quarter inch threaded portion of the pin hangs down below the steel beam onto which was screwed a one-quarter-three-eighths inch adapter. As the pin was one-quarter inch in diameter, an adapter was necessary to allow the connection of the three-eighths threaded rod. Therefore, the adapter was screwed on to the pin, after insertion into the steel beam, and then the three-eighths threaded rod, approximately eight inches in length, was screwed into the adapter. (A: 58) This formed one side of the trapeze. The second side of the trapeze was fabricated in a like manner, leaving two eight-inch threaded rods hanging down from the overhead beam. The conduit would then be placed between the three-eighths threaded rod by two men on ladders, and the uni-strut bolted beneath it to hold it up in place. (A: 60) In this manner, some 60 feet of three-inch conduit pipe was to be hung from the ceiling of the building in question (A: 14) later to be additionally supported by partitions, and eventually to have electrical wire pulled through in the course of wiring the building.

At the time of the accident, one of the fasteners that had been driven into the steel beam broke (A: 68), shortly after the conduit had been put into place, and while the plaintiff was ascending the ladder. (A: 286)

The evidence in the record suggests that the fastener broke as the result of some sideways or bending force applied to the trapeze as the conduit was being put into place by the plaintiff and his co-worker. (A: 48) The two men, each standing on a ladder some eight to ten feet from the

ground, and holding a length of three-inch steel pipe weighing approximately 150 lbs. were as careful as possible not to bend the trapeze in the course of inserting the pipe in the trapeze. However, the evidence suggests that some bending force was applied in the course of this work, fracturing the fastener in question.

The evidence indicates that the use of these power actuated fasteners to connect the trapeze to the steel beam was inappropriate. The fastener was not designed to withstand a significant bending force applied to it, although as tested such fasteners could each hold in excess of a ton when inserted into a steel beam if no bending were involved. The story of how these fasteners came to be selected and used for this purpose was undoubtedly the basis for the jury's verdict in favor of the plaintiff on the theory of negligence.

The plaintiff was employed on the job as an industrial electrician helper, or apprentice. His previous experience in the job had been some eight months working on other construction projects in the State of Vermont. He had an eighth grade education, and prior to 1966, his entire work experience was that of farming. (A: 271) From 1966 until early 1970, he had worked in a variety of jobs, none of them in the construction or electrical field, with the exception of a two week period as an electrician in a residential project. On the day in question, he was working as a helper or an assistant to a master electrician, the co-worker described previously, whose name was Clement Vallieres. (A: 75) The plaintiff Quinlan had no previous experience with heavy three-inch conduit, nor had he worked previously

with Hilti equipment - power actuated fasteners or the power actuated tools. (A: 75) In his job as helper, he had no particular formal training. (A: 291)

On the day in question, Quinlan and Vallieres (known as Frenchie) arrived on the job site and were told by the foreman to hang the conduit in the manner already described. Vallieres, being a master electrician, and experienced with Hilti equipment, did not like the idea. He thought it was dangerous, and he complained to his foreman, a fellow named Walker. Walker suggested that Vallieres' job might be in jeopardy if he did not do as he was told, and apparently the work proceeded as instructed. (A: 74) The evidence suggests that Quinlan had no part in nor did he hear this conversation. (A: 282) The jury, in answer to specific written interrogatories, found no contributory negligence on the part of Quinlan.

While apparently Vallieres thought that using Hilti power actuated fasteners to build a trapeze or hanger for the three-inch steel conduit was something less than a good idea, the dangers involved were evidently unapparent to the project superintendent, one Hans Huva. A few days before the accident in question, the superintendent Huva was purchasing some power actuated fasteners for concrete from the Hilti salesman, a fellow named Theodore Smith. (A: 110) Smith was the sales representative of Hilti in the State of Vermont, and he drove a little red truck, conspicuously marked with the Hilti wares. (A: 384) The evidence was that this was the only, and very successful, means of the defendant selling its products. (A: 334-335) Hilti power actuated fasteners were unavailable in hardware stores, or other such outlets. They were purchased through Hilti salesmen. (A: 334) Consequently, when Hans Huva needed some fasteners for concrete, he would telephone to the

Hilti salesman, who in due course arrived on the construction site with his truck loaded with merchandise. (A: 124) On the day in question when Smith came to the site, Huva apparently thought of his upcoming project of hanging conduits because in addition to purchasing fasteners for concrete, he asked Smith if he had any fasteners for steel (A: 111), to which Smith replied that he did. (A: 313) In the ensuing conversation and questioning by Huva, Smith explained the steel fasteners, how they worked, and how much weight they would hold. (A: 313) In response to questioning from Huva, Smith produced a catalogue showing the weight carrying capacity of Hilti fasteners in steel. (A: 314) On the basis of the specifications, Huva bought a box of pins. (A: 113) "I consulted with my general foreman. We talked things over and see these substantiating figures and therefore their load-carrying capacity and we'll make our hangers out of these pins and adapters." (Huva A: 114) The evidence suggested that Huva was not familiar with the Hilti steel fasteners as opposed to those designed for concrete. (A: 325) To make the trapeze, it was obviously necessary to buy something to enable the three-eighths threaded rod to be attached to the threaded end of the fastener, and for this purpose Huva simultaneously bought from Smith a box of the steel fasteners and a box of the one-quarter to three-eighths inch adapters. (A: 113, 327) There is no question in the evidence that Smith logically assumed that the fasteners and adapters were to be used together (A: 328), and he knew that Huva planned to hang a stationary object (A: 325) and that he was going to insert a three-eighths inch steel rod in the adapter (A: 330) or hang or suspend a stationary item down and make a platform to hold something up. (A: 329) It was denied by Smith that

he knew at the time Huva was to make a trapeze to hang three-inch steel conduit, but he conceded on cross-examination that after five years experience, if he were asked if he had pins (fasteners) and a customer bought something like the pin (fastener) and something like the adapter, he would do a little more inquiring as to how the application was going to be put together. (A: 331) In any event, the result of the meeting between Smith and Huva was that a box each of fasteners and adapters were purchased from Hilti for use in constructing hangers for three-inch conduit pipe, and the plaintiff got injured when one of the fasteners was bent so that it fractured, causing the conduit to knock him off the ladder.

At the trial no effort was made by counsel for the plaintiff to justify the use of Hilti fasteners in constructing the hangers. The evidence at the trial concerning the fasteners was to the effect that by publishing Hilti literature, each fastener in steel would hold some 2,320 lbs. in tension (meaning a force pulling directly in line with the fastener). (A: 112) In addition, the published figures told that each fastener would hold some 2,819 lbs. in sheer (meaning a force exerted directly sideways on the fasteners flush with the material into which the pin was inserted). (A: 112) No materials were published by Hilti to indicate how much twisting force these pins would take, as when a nut or an adapter were tightened on the pin with a wrench, nor was there any warning against excessive bending, such as a force exerted at the end of an eight-inch three-eighths threaded rod as took place in the course of this accident. The case went to the jury with a conflict in the evidence as between the plaintiff and defendant concerning whether other manufacturers of fasteners, whether bolts, nails or

whatever, supply written warnings as to torque and bending forces. The case also went to the jury with all of the testimony of the involvement of Smith on behalf of the defendant in selling those products to Huva and the degree to which Smith held himself out as knowledgeable in the use of Hilti fastening systems with ability to obtain expert advice from the defendant's resident engineers in cases of difficult or questionable fastening application. It is the evidence of Smith's involvement in the transaction and the evidence of his being held out as their representative as source of information which the appellant feels supports the verdict on the question of negligence and distinguishes the theory of negligence from the doctrine of strict liability as applied to the facts of this case.

At the trial the evidence was hotly disputed as between the plaintiff and defendant concerning the nature of fastening systems in general, the warnings to be published or not published in the literature with them, the purpose or purposes for which fasteners should be used, and whether bending forces should be applied to them. The defendant's expert asserted that a fastener's use was "to pull things up tight to bring them together". (A: 426) Moreover, it was "the only use we teach; its the only use we know of; its the only use our customers know of. . ." (A: 395) The evidence was largely uncontested, however, that Smith was the sole source from which the Hilti products could be purchased from the defendant in Vermont, that he traveled from job site to job site in his truck selling the defendant's products, passing out literature on its products, and training construction workers in the use of Hilti power actuated tools. Following his training of an employee in the use of this equipment, he would pass out a

card to employees that had shown evidence of satisfactory training as a sort of license to use the Hilti equipment. He would suggest applications for the Hilti fasteners to aid purchasers in a more effective use of the Hilti products, thereby helping the customer and generally increasing sales. (A: 402) Of particular significance was the availability of expert engineering advice from the home office of Hilti, free of charge to customers, upon the inquiry of Smith on behalf of his customers. (A: 402) This service was available any time there was a question of safety or a question of a novel or unusual application of the product. (A: 384, 387) This service was available on the day the fasteners and adapters were sold to Huva, although Huva did not apparently request any such service, nor did it occur to Smith that the situation was in need of it. Part of the salesman's job was to spot non-standard applications and to refer them to the Hilti engineers on the staff for advice as to fabricating a safe system. (A: 384-386, 421-422) The evidence is clear that at the time of the accident Smith had been on the job for a period of less than eight weeks. He had a bachelor of arts degree from college, but he had never worked in the construction field. His entire work experience before coming to Hilti had been office type work, primarily within New York and New Jersey Heart Associations. (A: 316) In July of 1970, at the time of the sale to Huva, Smith's only training had been one week of on the job riding in the truck with a salesman in New Hampshire. (A: 320) Formal school training was available in Tarrytown, New York from the defendant's organization, but this training did not take place until the month following the accident,

at which time Smith was sent to Tarrytown, New York for the Hilti training session. (A: 322)

Although the Hilti power actuated fasteners were alleged in the defendant's testimony to be unsuited and unintended for use in the construction of conduit hangers, the defendant introduced at the trial an exhibit (Transcript: 257) consisting of a drawing of a design in which the same fasteners could be used safely in the construction of a conduit hanger. The exhibit was created and drawn by the engineers at the Hilti headquarters, that same source to which Smith could have turned for help to construct Huva's conduit hanger. That Smith was unaware of the nature of the product which he was selling was supported by the testimony of Vallieres wherein Smith came to the job site after the accident, watched a fastener applied to an overhead beam, and expressed surprise that the pin was so brittle and would break when bent with a set of pliers. (A: 76-79) The defendant's expert, Dr. Zinc, an engineer and attorney employed by Hilti, testified that a construction fastener is designed to draw two things up close together and hold them there. (A: 494,495) Furthermore, an essential reason for bringing two things tightly together is to create friction which in turn distributes the load over the entire fastener and this avoids bending forces. (Transcript: 456) The evidence at the scene of the sale to Huva, however, show that the pins sold by Smith were to be used not as "fasteners", but as a means of hanging something when used in conjunction with the adapters. (A: 326)

It is the position of the plaintiff that the facts introduced at the trial available to support the theory of negligence, while common

in some instances, were essentially distinct from those facts necessary to support the theory of strict liability in tort.

ARGUMENT

I. THE JURY'S VERDICT ON THE THEORIES OF STRICT LIABILITY IN TORT AND NEGLIGENCE WERE NOT INCONSISTENT

The principal point raised by the defendant is that the decision of the jury in favor of the plaintiff on the ground of negligence is inconsistent with its finding in favor of the defendant on the theory of strict liability. Cases are cited where opposite results on different theories lead to an inconsistency in the verdict that requires reversal of the judgment. That those cases are well founded when their facts are considered undoubtedly may be true. The problem with defendant's reasoning is that the cases cited do not have factual situations that are instructive here. Some of the cases cited involve a single set of facts in each case being asked to support two theories of recovery. Other situations involve one theory being submitted to the jury, and the Appellate Court in dicta discussed and compared aspects of two theories of recovery. No decision cited by the defendant has separate operative facts in support of two theories of recovery where the jury found for the plaintiff on one theory and for the defendant on the other. When the facts of this case are analyzed, however, the distinction is important. It must be remembered that as in many products cases, we have here a case where the product in question is sold in the millions (one-half billion in the United States alone. A: 392) but, unlike many products cases, the sole salesman for a whole state - alone

from whom the product could be bought - was on the scene of the product's used and had a hand in its selection. The legal literature contains cases where strict liability finds a product defective for failure to warn against a use reasonably to be anticipated by the manufacturer. For instance, those cases involving drugs where a dosage should not exceed a certain number of pills per day. The product was not itself defective, except for the failure to warn the purchaser who would be expected not to know of the danger. The product in this case had no warning against imposing bending forces on the Hilti power actuated pin. Still, defendant at the trial argued persuasively that the bending force which broke the pin when used to build a conduit hanger was not to be reasonably anticipated by the manufacturer. Therefore, the failure to warn did not make the product defective or unreasonably dangerous. In much of the evidence in this case, the defendant sought to compare the Hilti fastener with common nails and bolts. Much was made of the fact that nails and bolts do not carry with them a warning by the manufacturer against bending forces. The argument was that because nails and bolts are fasteners, and since the Hilti power actuated pin was a fastener, the same standard should apply to both. The manufacturer claimed it would not be expected to anticipate the use of such a common thing as a fastener in a situation where a bending force would be applied. It is urged by Hilti that as we are dealing with fasteners and the foreseeability by the manufacturer of an intended use by the purchaser, the jury's finding in favor of the defendant on the grounds of strict liability is inconsistent with its finding in favor of the plaintiff on the theory of negligence, inasmuch as the liability in each case is indistinguishable.

The argument of the defendant first fails to take into account the facts of this case that separate it from those cited, and the general run of products liability cases involving negligence or strict liability. Secondly, the Court's charge to the jury in this case is materially different as between the theories of negligence and strict liability because of the particular facts of this case. The plaintiff believes the charge was appropriate and was followed in all its essential elements by the jury.

The charge to the jury is set forth in material part beginning on page 19 of the Appendix. No objection has been raised in the Appellant's Brief as to the charge to the jury, and therefore any objections thereto have been waived and it becomes the law of the case. See Greenberg v. Giddings, 127 Vt. 242 at 245, 246 A.2d 832 (1968) and Conner v. United States, 439 F.2d 974 (C.A. Tex. 1971). Furthermore, because the facts involving the two theories in the case were not identical, the court appropriately charged in a different manner concerning the scope of the duties owed by the defendant under each theory. The following language from the charge on strict liability is based largely on Restatement of Torts §402A:

> "Now, if injury resulted from an abnormal use of the product or an abnormal method in which it was used, the defendant is not liable." (A: 19)
>
> "Now, what is meant by unreasonably dangerous is that the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics." (A: 19)
>
> "The plaintiff contents that Hilti's failure to warn meant that the fasteners were sold in an unrea-

sonably dangerous condition beyond that contemplated by the ordinary construction firm.

"The defendant on its side of the case contends that the plaintiff's employer put the fasteners to an unreasonable use." (A: 20-21)

The clear inference from the Court's charge on strict liability was that if Huva put the product to an unreasonable use, "an abnormal use of the product or an abnormal method", the defendant is not liable. Conversely, if Huva put the product to a normally anticipated use, involving a danger with respect to which the defendant failed to warn, the plaintiff could recover. Clearly, the jury found, and the evidence does not really dispute, an abnormal use of the product. The essential thrust of the plaintiff's case was that although the use may have been abnormal or unreasonable, the defendant knew it and failed to warn. The overall command of the Court's charge on the question of strict liability, however, directed the jury to find for the defendant if the use by Huva was abnormal or unreasonable. Based upon the facts of this case and the Court's charge to the jury on strict liability, the jury's conclusions on this theory were predictable.

With respect to negligence, however, the situation is materially different. Were this a case where the fasteners were purchased by Huva off a shelf in a hardware store, such as nails and bolts, the defendant might have a point. The manufacturer would have had no contact with Huva, and it would have had no knowledge of or participation in the sale. The presence of Smith, the defendant's salesman, and only outlet for its products in Vermont, makes a vital difference. The Court's charge on the theory of

negligence is found on page 23 of the Appendix, and following and is based essentially on Restatement of Torts §388:

> "And the question then is whether the defendant, Hilti, was negligent in supplying the fasteners and adapters to the Renzi Company, the plaintiff's employer. The plaintiff alleges the defendant was negligent in this respect in that it had reason to know that the fasteners coupled with the adapter were likely to be dangerous for the use for which it was supplied, and had no reason to believe that the purchaser would realize its dangerous condition and, therefore, the defendant failed to exercise reasonable care to inform the user, such as the plaintiff, of the facts which made the fastening devices, that is both the pin and the adapter, dangerous, when used in any situation where bending forces were to be applied."
>
> "Foresight of harm lies at the foundation of negligence, thus foreseeable consequences are significant in determining whether the defendant exercised reasonable care for the plaintiff's safety. . .
>
> "The opportunity for knowledge when available by the exercise of reasonable care is the equivalent of knowledge itself, and knowledge essential to the duty need not be actual; it may be implied, imputed and constructed from the circumstances. And where knowledge is required, voluntary ignorance of the facts may constitute fault and will afford no protection from legal liability.
>
> "In other words, it wouldn't do for a person to say I didn't know of a fact which I should have known, or I couldn't foresee a danger which should have been foreseen." (A: 23-24)

The above quotations from the charge to the jury on the question of negligence is essentially different from that on strict liability in that it does not purport to restrict recovery for the plaintiff only to those cases where the use to which the fastener was put could be characterized as reasonable or normal. The abnormal and unreasonable use or

application by Huva is included as a danger against which the defendant should warn. Although defendant contended at the trial that Huva never advised Smith as to the details of his intended hanger application for the fasteners, the circumstances surrounding the conversation between Smith and Huva could easily support the jury's belief that Smith should have been aware of Huva's misapplication of the product and done some inquiring about it. "And where knowledge is required, voluntary ignorance of the facts may constitute fault and will afford no protection from legal liability." (The Court's charge, A: 24) The charge makes it clear that if Smith was in a position to see the danger and warn of it, he should have done so, and his failure in this regard will bind Hilti. "In other words, it won't do for a person to say I didn't know of a fact which I should have known, or I couldn't foresee danger which should have been foreseen." (Court's charge, A: 24) With respect to the Court's charge on negligence, therefore, Smith's participation in the sale, and the circumstances surrounding the transaction in general, take on added significance. Here we have a company actively involved in the selection of the product, and the question of an unforeseeable use of the product therefore diminishes in its effect as a defense to negligence. The defendant says that a fastener is designed to hold two things together. There is no question, however, that the fasteners here were sold in conjunction with the adapters and with knowledge on the part of Smith that something was to be hung or suspended. Furthermore, whatever was to be suspended, even if not known by Smith, was heavy enough to prompt an inquiry from Huva as to the load the pins were

designed to carry. If not specifically aware of the use in fastening a hanger to a beam, enough facts were known, or admittedly suspected by Smith, to put the Company on notice of an unintended use. A reasonable basis was therefore present for the jury to find a negligent failure to warn on the part of the defendant. Smith's opportunity to know of the purchaser's intended use in this case supports the jury's finding as to his employer's duty to warn. It is interesting to note that the jury requested to have re-read Smith's testimony midway in their deliberations. Clearly his involvement was of interest to the jury in this case. His active participation in the dissemination of technical information to Huva does not change the character of the product, but it defines the actual or constructive knowledge of the defendant and increases its duty to warn. Smith's presence and involvement supplies the defendant with an opportunity to alter the course of events which it would not have had in a sale to a purchaser from a retail outlet. This direct contact with the purchaser, and the opportunity to change the course of events, brings into play the conduct of a reasonably prudent person under similar circumstances, a doctrine historically found in negligence and generally foreign to strict liability products cases. Because the charge to the jury on the theory of negligence is different in scope than the Court's charge to the jury on strict liability, and because the facts upon which each theory rests is different, there can be no inconsistency in the verdict.

In its argument as to inconsistent verdicts, the defendant notes that at the close of the charge the defendant's attorney objected to the

duplicity of the theories, requesting that the Court require the plaintiff to elect between them. (Appellant s Brief, page 17) The case of Jimenez v. Sears, Roebuck and Co., 93 Cal.Rptr. 769, 482 P.2d 681 (1971), a ladder case, held that a charge to the jury on the theory of negligence should have been included with a charge on strict liability.

Much of the controversy in the instant case centers around the question of whether the failure to warn, as maintained by the plaintiff, rendered the product unreasonably dangerous. Dr. McLay, the expert for the plaintiff, testified to some extent on this point, as did Dr. Zinc, the defendant's expert. Dr. McLay's testimony tended to favor the plaintiff while Dr. Zinc sought to minimize the characterization of the product as unreasonably dangerous on the basis of a failure to warn. In Court s charge based upon Restatement of Torts §402A, in order for the plaintiff to recover, the product must have been shown to be unreasonably dangerous, defined as ". . . dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with ordinary knowledge common to the community as to its characteristics." (A. 19) The Vermont cases until recently have not considered the doctrine of strict liability in tort, and then have not specifically considered the meaning of unreasonably dangerous. Zaleskie v. Joyce, 133 Vt. 150 (1975) At least three states (New Jersey, California and Illinois) have specifically excluded the requirement of unreasonably dangerous from the doctrine of strict liability. Glass v. Ford Motor Company, 123 N.J. Super 599, 304 A.2d 562; Cronin v. J. B. E. Olson Corp., 104 Cal.Rptr. 433, 501 P.2d 1153

(1962); Pyalt v. Engel Equipment, Inc., 17 Ill. App.3d 1070, 309 N.E.2d 225 (1974) As stated by the California Supreme Court in Cronin, supra, the requirement of unreasonable danger ". . . places upon him (the plaintiff) a significantly increased burden and represents a step backward in the area pioneered by this court." Other states, however, have adopted the requirement of unreasonable danger and its definition as contained in the Restatement. Inasmuch as no Vermont cases have spoken in this area, it may well be that the Vermont Supreme Court would decline to include the "unreasonably dangerous" requirement. In any event, this requirement in the Restatement was charged by the Judge in this case, and being the more restrictive or conservative view, the defendant cannot complain. The inclusion of the "unreasonably dangerous" requirement on the charge in strict liability, nevertheless again makes the Court's charge more restrictive in strict liability than in negligence, further supporting the jury's findings for the defendant on one theory and for the plaintiff on the other. The jury could well have found the product not unreasonably dangerous pursuant to the strict liability charge, but as this requirement was properly not includable in the negligence charge, the jury found for the plaintiff on this theory.

The defendant makes the argument that the Court charged both theories (negligence and strict liability) in terms of foreseeable consequences. This is simply not the fact. The Court's charge on strict liability spoke of anticipated use, never mentioning foreseeability of harm. In the instructions dealing with negligence, the Court spoke of

foresight of harm and foreseeable consequences. What the manufacturer should have anticipated as an intended and proper use of its fasteners when it set out to market the product might well be different from what Smith should have foreseen as a danger when he spoke with Huva, provided him with specifications, and sold him the adapters to suspend something from the pins.

To the extent that anticipated use in strict liability is sought to be equated with foreseeable harm in negligence, it is important to understand the distinction. In the Third Circuit case of Eshbach v. W. T. Grant's & Company, 481 F.2d 940 (1973), Eshbach purchased a riding lawn mower from W. T. Grant's. Eshbach's son, age 9, removed the mower from the garage, started it, and attempted to mow the lawn. His little sister jumped on the back of the mower for a ride, and was injured when her foot slipped into the unguarded chain and sprocket of the machine. The case was tried on the doctrine of strict liability and went to the jury on that theory. Verdict was for the defendant, and the plaintiff appealed on the ground that the Court charged the jury in concepts of foreseeability and defined the limits of responsibility of Grant's in terms of a "reasonable man". Id, at 941. The Appellate Court reversed the following language from the case is instructive here:

> "The focus of Section 402A . . . is not directed to to the foreseeability of a given injury, but to whether 'the product is, at the time it leaves the sellers' hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.' §402A, Comment G. '[t]he duty of a manufacturer or supplier is limited to foreseeing the probable results of the normal use of product or a use which can be reasonably anticipated.'

> [Citing cases] Thus, the proper limits of responsibility for the defendant-seller here is whether the 'use' to which the product was put was intended or foreseeable (objectively reasonable) by the defendant. [Citing cases]
>
> "The use of foreseeability in the court's instructions here does not reflect this limitation. When the court instructed the jury that Grant's was to be liable only if - in substance - anticipate or foresaw the individualistic behavior patterns of the Eshbach children when using the lawn mower for the purpose for which it was designed - cut grass - it subverted the intention of Section 402A by permitting a vendor to avoid liability on the basis of being unable to anticipate the precise manner in which the injury occurred." Id at 492-493

In the instant case, the charge to the jury was properly on both strict liability and negligence. However, the Court did not intend the reasonably anticipated use, or use which could be reasonably anticipated under 402A, to be confused with the foreseeable consequences of Huva's misapplication of the Hilti fasteners when Smith sold the fasteners and adapters, disseminated the technical literature, and discussed the merits of his product with Huva.

The Court's language in Eshbach is instructive because it focuses on the point that under 402A the generally anticipated use, of the product defines the scope of the defendant's liability, while under the Restatement Section 388, the foreseeable consequences of harm is defined considerably by the known or reasonably to be foreseen injury to the customer. In Eshbach, the defendant had no opportunity to become aware of the particular use by the Eshbach children, although use by children may well be something to be anticipated under 402A. In any event, 402A was the proper theory on

which to try that case. On the other hand, in the instant case both anticipated use by the manufacturer and foreseeable harm by the manufacturer's salesman were in issue. There is no inconsistency in the verdict by finding for the defendant on one issue and for the plaintiff on the other.

II. THE COURT DURING THE TRIAL DID NOT COMMIT ERROR IN THE ADMISSION OF CERTAIN TESTIMONY OF THE PLAINTIFF'S EXPERT WITNESS.

The defendant objects to the admission of certain testimony of the plaintiff's expert, Dr. McLay. He was allowed to testify as to the misleading nature of the defendant's literature disseminated by Smith, particularly the published figures as to the tension and sheer strength of the pins. (A: 180) This followed general testimony of Dr. McLay on the nature of an engineer's duty in designing a product so as to avoid dangers in anticipated uses by the public. (A: 178) Presumably defendant is objecting to Dr. McLay's testimony as being admitted improperly on the theory of negligence. It would seem that defendant would not be complaining of its admission on the ground of strict liability, inasmuch as verdict was for the defendant on that theory.

The plaintiff contends, however, that the admission of the testimony in question was proper and could be justified on the theory of strict liability alone. As a professor at the University of Vermont in Mechanical Engineering, and a designer of machinery and equipment (Transcript: 168-169), Dr. McLay was well qualified to testify as to considerations to be given by an engineer in the course of designing a product. One of these considerations would certainly be the anticipated use of the product and ways in which consumers might be injured by its particular characteristics. As defendant

hotly contested the question of anticipated use of the Hilti fasteners, Dr. McLay's testimony was certainly relevant as to whether the literature put out with those fasteners was misleading. As the evidence was relevant and admissible on the question of strict liability, the defendant cannot complain because it certainly sustained no prejudice on that issue. In short, the plaintiff on the question of strict liability was required to prove that the ordinary manufacturer in the ordinary marketing of its product would anticipate that construction firms would put fasteners and adapters of the type here in question in applications similar to this particular case. Consequently, whether or not the literature in question would tend to encourage such uses or applications is quite relevant.

On the question of the defendant's negligence, on the other hand, the literature's figures disseminated in the course of selling its product would seem to bear on the question of whether the defendant acted prudently in the information it gave the customer. The Court excluded questions relating to whether Huva himself was mislead by the literature, leaving that question to the jury's consideration. However, it is interesting to note that Huva himself, when asked by the defendant's attorney whether he was "mislead to thinking these things wouldn't break or bend, because they would hold such a great weight. Now, is there any truth to that at all?", answered: "well, there is a little truth in it." Question: "How?", Answer: "Cause they are fasteners, they are supposed to hold over 2,000 lbs." (A: 144)

Throughout Huva's testimony it was clear that he based his selection of the fasteners and adapters to fabricate into hangers in large part

on the figures that were given to him by Smith.

"Q. So they exceeded what you expected would be carrying by over a thousand percent? (sic)

A. That is correct. There was a safety factor, large safety factor." (A: 112)

"Q. On the basis then of the specifications, tension and sheer, you ordered these particular pins?

A. Yes, we ordered a box of these starts (sic) of pins and also a box of loads (sic)" (A: 113)

"Q. So you are the person who designed this particular method of carrying and holding this conduit?

A. Sort of, yes. I was responsible to ordering the materials and I consulted with my general foreman. We talked the things over and see these substantiating figures and therefore their load - carrying capacities and will make our hangers out of these pins and adapters." (A: 114)

"Cross-Examination:

Q. Alright, but you chose to use these particular fasteners, and you had your own good reasons, I'm sure, for choosing these, but this is what you chose as opposed to other things that you might have chosen?

A. That is, that is correct. I was convinced that they would do the job." (A: 132)

"Q. And you bought some of the fasteners you were convinced would do the job?

A. Right, like I mentioned before, I, I checked the load carrying capacity and after I was satisfied that we had a safety factor, a large factor, a large safety factor built in there, I decided to give them a try." (A: 133)

"Q. And when you looked at these, you - incidently, were going to hang a pretty heavy weight overhead, and if it let go, it would hurt somebody - we can agree on that?

A. No, the figures confirm that ---

An objection - overruled

Q. Go ahead, sir, answer the question.

A. If the figures were there, I was only going to hang, or the men were going to hang a ten percent of the load carrying capacity." (A: 137)

Therefore, in view of the questions and answers, both on direct and cross-examination, of Huva, who testified before Dr. McLay, the issue of whether the material was misleading was relevant also on the question of negligence. Whether the defendant was negligent in disseminating such written information, would seem an appropriate area for the plaintiff's

expert, a mechanical engineer and professor, to get into.

If the objection to the questioning is on the ground of opinions on the ultimate question, Rule 704 of the Federal Rules of Evidence, in effect at the time this case was tried, clearly allows expert testimony in terms of opinion without prior disclosure of underlying fact or data, unless the Court requires otherwise. The defendant did not request, nor did the Court require, such disclosure, if such disclosure was at all necessary. In commenting upon Rule 702, John M. Donoghue in discussing the new Federal Rules of Evidence states: "The rule does not in terms limit expert testimony to matters that are beyond the competence of lay persons." Resource materials, Federal Rules of Evidence, American Law Institute - American Bar Association Committee on Continuing Professional Education, Page 236 (1975).

III. THE EVIDENCE ON THE QUESTION OF THE DEFENDANT'S NEGLIGENCE WAS SUFFICIENT TO SUPPORT A VERDICT IN FAVOR OF THE PLAINTIFF ON THIS THEORY.

Defendant argues that in order to take a case to a jury in a negligence action, the plaintiff must introduce evidence which fairly and reasonably tends to support the claim being advanced. Peterson v. Provost, 119 Vt. 445, 128 A.2d 668 (1956)(Appellant's Brief, page 24) That case, of course, reiterated the time honored rule that in considering such questions, the evidence must be taken in the light most favorable to the plaintiff. Contradictions and contrary inferences raised by evidence would be for the jury.

In the foregoing sections of this brief, the evidence supporting a finding by the jury of negligence on the part of the defendant has been

set forth in some detail, and should not be extensively repeated here.

The transcript seems clearly to contain more than a scintilla of evidence against the defendant. Throughtout its brief, the defendant seems to characterize this case as one in the usual products liability pattern where the consumer alone selects the product, commonly packaged and picked off of shelves or sold from open bins where the selection rests entirely with the consumer, without contact with the manufacturer. This case, however, has unusual elements not commonly found in such cases.

1). Smith sold his products from a truck, on the job site at the place of business of his customer.

2) Smith sold and promoted a fastening system, complete with an assortment of pins for many different uses, tools to insert the pins, and adapters to make them useful in various applications.

3) Smith drove throughout Vermont as the only sales representative of the defendant in this area.

4) Smith was the only person in Vermont possessed with the ability to promote the product to customers by suggesting uses and applications of the product, together with the ability to train construction personnel and license them in their use of tools.

5) Smith had the capability and duty to obtain information from his company as to proper designs or fabrications involving his products, (A: 384-386, 421-422) and to refer unusual or questionable applications to the Hilti engineers for approval and help in design. (Defendant's exhibit G) (Transcript: 257-258)

6) The defendant provided Smith with written technical literature concerning the capabilities of the product that was distributed to customers, particularly to Huva who requested information as to the breaking strength of the pins.

7) Smith had a particular and distinct conversation with Huva concerning the capabilities of a particular type of pin to fasten in steel. Huva requested the information, and it was apparent to Smith at the time of the transaction that he was not familiar particularly with the steel fasteners.

8) Smith admittedly suspected, and therefore should have known or inquired, as to the particular use for which Huva was to put the fasteners.

All this is clearly more than a scintilla of evidence. It is, to quote from the defendant's brief, "the stern stuff of which the evidence is made". The defendant clearly wanted a competent representative in the field to promote the sales of its products, and its position in this case is that its salesman in no way could possibly know the manner in which the fasteners sold by him to Huva would be used. If so, this is the voluntary ignorance concerning which the court instructed the jury. Dr. Zinc testified the fasteners should be used only where two materials are to be held tightly together. This is considered by the defendant to be the standard application. Yet Smith very well knew when he sold the pins in conjunction with the adapters that something was to be suspended or hung, and the weight was sufficient for Huva to inquire about the breaking

strength of the pins. This certainly is notice to a man in Smith's position if he has sufficient training consistent with the abilities he possessed as held out to the public by the defendant. (A: 422) The jury could well have found that Hilti's negligence lay in the lack of training given to a salesman who was purported to have such expertise, the ability to license workman, suggest applications, and obtain information in unusual situations from the home office. Smith had only one week of over the road training before he was put out on his own, and he did not go to Tarrytown, New York for the Hilti course until almost a month after the accident.

It is note worthy that in reviewing the evidence and stating it in the light most favorable to the plaintiff, it is not necessary to refer to any portion of the evidence of Dr. McLay, the plaintiff's expert. The acts of negligence complained of can be found in the company's employment of Smith, the sending of him into the field relatively untrained, his dissemination of technical information to Huva without asking for further details in view of Huva's clear concern as to the breaking strength of the pins, and the failure of the defendant to supply Smith with at least enough information warning against bending forces to enable him to competently advise Huva. If, as the defendant asserts, everyone in the industry knew that fasteners should not be subjected to bending forces, it seems that the one person who did not know it was Smith. The person who made Smith aware of the weakness of the pins in this regard was Vallieres, shortly after the accident, when he gave Smith a set of pliers and showed him how easy it was to break the pins after inserting them in steel beams. (A: 76-79)

The evidence of negligence appears more than a scintilla in favor of the plaintiff, and the judgment should be affirmed.

CONCLUSION

Based upon the court's charge to the jury on the theory of negligence, and the evidence produced at the trial support thereof, plaintiff respectfully requests the Appellate Court to affirm the judgment below.

RESPECTFULLY SUBMITTED,

HOFF, CURTIS, BRYAN, QUINN & JENKINS

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

FRANK A. QUINLAN	)	
	)	UNITED STATES COURT OF APPEALS
VS	)	FOR THE SECOND CIRCUIT, NO. 75-7514
	)	
HILTI, INC.	)	

CERTIFICATE OF SERVICE

I, Alden T. Bryan, Esq., a member of the law firm of Hoff, Curtis, Bryan, Quinn & Jenkins, hereby certify and say that on the 20th day of January, 1976, I served a copy of the Defendant-Appellee's Brief on Philip D. Saxer, Esq., 278 College Street, Burlington, Vermont 05401, by placing two copies of the same in an envelope properly addressed and prepaid and by placing said envelope in the United States mail for delivery.

Alden T. Bryan, Esq.